

1271  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

SUPREME-COURT OF THE UNITED STATES

No. A-513- 75-817

NEBRASKA PRESS ASSOCIATION, et al.,

Petitioners,

vs.

HUGH STUART, Judge District Court  
of Lincoln County, Nebraska,

Respondent.

MOTION TO TREAT PREVIOUSLY-FILED  
PAPERS AS A PETITION FOR A WRIT  
OF CERTIORARI, AND FOR AN EXPE-  
DITED HEARING

TO THE HONORABLE CHIEF JUSTICE and THE HONORABLE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Nebraska Press Association; Omaha  
World-Herald Company; the Journal-Star Printing Co.; Western  
Publishing Co.; North Platte Broadcasting Co.; Nebraska Broad-  
casters Association; Associated Press; United Press International;  
Nebraska Professional Chapter of the Society of Professional  
Journalists/Sigma Delta Chi; Kiley Armstrong; Edward C. Nicholls;  
James Huttenmaier; William Eddy, respectfully pray that this  
Court treat the "Application for Stay of an Order of the District  
Court in and for Lincoln County, Nebraska" filed in this Court  
on November 5, 1975, supplemented by an opinion and judgment  
of the Supreme Court of Nebraska in this case (under title of  
Nebraska ex rel. Nebraska Press Ass'n v. Stuart, No. 40471, and  
Nebraska v. Simants, No. 40445), issued on December 1, 1975  
(a copy of which was attached to a letter to the Deputy Clerk  
of this Court from counsel for Petitioners dated December 1,

1975), as a Petition for a Writ of Certiorari filed by Petitioners herein. In the alternative, Petitioners respectfully pray that the Court treat the instant motion, which incorporates by reference the opinion and judgment of the Nebraska Supreme Court referred to above, as their Petition for a Writ of Certiorari herein. (For the use of a similar procedure, see New York Times Co. v. United States, 403 U.S. 713 (1971).)

Jurisdiction is founded on 28 U.S.C. § 1257(3).

Petitioners recognize that this case presents several procedural peculiarities. Mr. Justice Blackmun, in his November 13, 1975, In Chambers opinion, deferred to the jurisdiction of the Nebraska Supreme Court. When that court refused to act promptly, Mr. Justice Blackmun treated that refusal as a final judgment and entered his own order on November 20, 1975. The Nebraska Supreme Court thereafter entered its opinion and judgment of December 1, 1975. There would appear to be some question, therefore, as to whether certiorari correctly should be sought from the prior restraint order of the Lincoln County District Court and the refusal of the Nebraska Supreme Court to act in a timely fashion upon an appeal from that order, or whether certiorari should instead be sought from the Nebraska Supreme Court opinion and judgment of December 1, 1975. However, since in either event Petitioners are seeking the same relief and on the same grounds, the problem is easily resolved by requesting certiorari in the alternative -- either from the District Court order and Nebraska Supreme Court refusal to act, or from the opinion and judgment of December 1. Since the opinion and judgment of December 1 are before the Court by virtue of being incorporated herein by reference, there would appear to be no difficulty in this Court taking whichever view

of the procedure to date that it feels is most appropriate.

Both the facts and the law have been sufficiently treated in the papers heretofore filed and will not be repeated here, in the interest of time. It is particularly vital that immediate action be taken by this Court in the light of the facts that the prior restraint order has been in effect for almost six weeks -- during which period the public has been deprived of important news about a judicial proceeding of vital local interest -- and that trial in the proceeding has now been set for January 5, 1976. Petitioners will add here only a few of the anomalies which have arisen in this most extraordinary proceeding and which might not be readily apparent to the Court:

(a) Petitioners may now print in full the opinion of the Nebraska Supreme Court (see page 16 of that opinion) but are not allowed to print the opinions in the same case of Mr. Justice Blackmun (see Mr. Justice Blackmun's November 20th opinion, page 10, paragraph 5).

(b) Petitioners, because they chose to contest the District Court's order, are subjected to prior restraints which under the Nebraska Supreme Court opinion are no longer applicable to any other media in the State of Nebraska or elsewhere (see December 1 opinion at pages 5 and 16). In other words, Petitioners' competitors can print and publish the very items of information which Petitioners may not. The Nebraska Supreme Court observed that if Petitioners had not contested the prior restraint order by submitting themselves to the jurisdiction of the District Court, they "could have ignored the [prior restraint] order." (Page 11.) This interpretation imposes a penalty on taking all appropriate steps to protect the

constitutional rights of the public as well as the media.

(c) Among the facts which the Nebraska Supreme Court forbids Petitioners from publishing (see page 16) is any "information strongly implicative of the accused as the perpetrator of the slayings." Such a restraint, which could apply to any fact from the suspect's arrest to his hiring of a criminal attorney, is totally incapable of logical interpretation and application.

(c) The "proof" of injury to the accused relied upon by the Nebraska Supreme Court (page 12) consisted of articles in three newspapers, one of which is published 200 miles from the present planned site of the trial and another of which is published 250 miles from the site and in another state.

(e) The restraints imposed by the Nebraska Supreme Court represent the views of a minority of that court. Chief Justice White and Justice Clinton dissented on jurisdictional grounds and never reached the merits. Justices Spencer and Newton joined the majority solely to resolve the dispute but said they agreed with the dissenters. Thus, the actual views which underlie the prior restraints imposed here apparently are only those of Justices Boslaugh, McCowan and Brodkey.

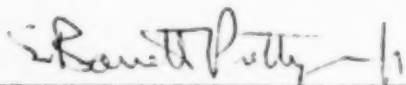
The record in this case is now on file in this Court. We respectfully submit that that record will not support a finding of "clear and present danger," not only of the type heretofore treated as controlling by this Court, but of any type at all.

If certiorari is granted, Petitioners are prepared to adhere to whatever briefing and hearing schedule is established by the Court. We respectfully suggest that typewritten briefs

could be filed within hours or days, and that argument could be held forthwith thereafter. Petitioners move for an expedited schedule in recognition of the fact that "the very day-by-day duration of [a] delay would constitute and aggravate a deprivation of \*\*\* constitutional rights, if any, that the petitioners possess and may properly assert." Mr. Justice Blackmun's In Chambers opinion of November 13, 1975, at page 6. In this regard, we again call the Court's attention to the doctrine asserted in United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), 476 F.2d 373 (5th Cir.), cert. denied, 414 U.S. 979 (1973), to the effect that the media must, on pain of criminal contempt, obey even a blatantly unconstitutional court order until that order is reversed on appeal. Whether that doctrine is right or wrong, it was premised upon the media's right of immediate appeal, hearing and decision. Almost six weeks of prior restraint obviously constitute a denial of that right.

Wherefore, Petitioners respectfully move that their Application heretofore filed in this Court on November 5, 1975, be treated as their Petition for a Writ of Certiorari herein, or, in the alternative, that the instant Motion be treated as such a Petition. Petitioners further move that if certiorari is granted, briefs be filed and a hearing scheduled on an expedited basis.

Respectfully submitted,  
HOGAN & HARTSON

By   
E. Barrett Prettyman, Jr.

815 Connecticut Avenue, N. W.  
Washington, D. C. 20006  
(202) 331-4685

McGILL, KOLEY & PARSONAGE, P.C.

By James L. Koley (EBP/h)  
James L. Koley

By Stephen T. McGill (EBP/h)  
Stephen T. McGill

Suite 217, 10050 Regency Circle  
Omaha, Nebraska 68114  
(402) 397-9988

Attorneys for Petitioners